



BILLING CODE 4333-15

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 21**

**[Docket No. FWS–HQ–MB–2017–0091; FF09M21200–189–FXMB12320900000]**

**RIN 1018–BC12**

### **Migratory Bird Permits; Removal of Depredation Orders for Double-crested Cormorants to Protect Aquaculture Facilities and Public Resources**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, are issuing this final rule to comply with a court order that vacated provisions of regulations governing control of depredating double-crested cormorants at aquaculture facilities and for control of double-crested cormorants to protect public resources. Pursuant to the U.S. District

Court for the District of Columbia order dated May 25, 2016, this rule removes regulatory provisions that allowed take of double-crested cormorants at aquaculture facilities and to protect public resources without the need for a permit.

**DATES:** This action is effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** This final rule is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–HQ–MB–2017–0091.

**FOR FURTHER INFORMATION CONTACT:** Ken Richkus, Acting Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, Virginia 22041–3803, telephone (703) 358–1780. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1–800–877–8337 for TTY assistance.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The U.S. Fish and Wildlife Service (Service) is delegated the primary responsibility of conserving migratory birds through protection, restoration, and management. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), which implements conventions with Great Britain (for Canada), Mexico, Japan, and Russia. We implement the provisions of the MBTA through

regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR).

Regulations pertaining to migratory bird permits are at 50 CFR part 21. Subpart D of part 21 contains regulations for the control of depredating birds. Depredation and control orders authorize the take of specific species of migratory birds for specific purposes without a Federal depredation permit, as long as the control and depredation actions comply with the regulatory requirements of the order.

The two depredation orders at issue in this final rule—the Aquaculture Depredation Order (“AQDO”), at 50 CFR 21.47, and the Public Resource Depredation Order (“PRDO”), at 50 CFR 21.48 (collectively, the “Orders”)—have been reissued every 5 years since their initial promulgation in 1998 and 2003, respectively. The AQDO was adopted by the Service in 1998 in response to complaints that the fish-eating habits of the cormorants were becoming increasingly costly to aquaculture and other industries. The AQDO authorized “landowners, operators, and tenants actually engaged in the production of commercial freshwater aquaculture stocks (or their employees or agents)” in certain States to take cormorants “when found committing or about to commit depredations to aquaculture stocks” (63 FR 10550, March 4, 1998). The authority granted by the AQDO would “automatically expire on April 30, 2005, unless revoked or specifically extended prior to that date.”

In 1999, in response to continued complaints, the Service issued a notice of intent to develop a national cormorant plan. See Migratory Bird Permits; Notice of Intent To Prepare an Environmental Impact Statement and National Management

Plan for the Double-Crested Cormorant (64 FR 60826, November 8, 1999). In 2003 the agency issued a final environmental impact statement (EIS), which presented six alternatives for the management of double-crested cormorants: (1) no action (continuation of existing management practices); (2) only nonlethal management techniques; (3) expansion of existing management policies; (4) a new depredation order; (5) reduction of regional cormorant populations; and (6) frameworks for a cormorant hunting season. See Migratory Bird Permits; Regulations for Double-Crested Cormorant Management (68 FR 58022, October 8, 2003). The EIS recommended the fourth of these alternatives: issuance of a new depredation order. Accordingly, the Service promulgated the PRDO, which authorized State fish and wildlife agencies, Federally recognized Tribes, and State Directors of the Wildlife Services program of the U.S. Department of Agriculture Animal and Plant Health Inspection Service to “take,” without a permit, cormorants found committing or about to commit depredations on the public resources of fish, wildlife, plants, and their habitats. Both orders, issued in 2003, would expire on April 30, 2009.

In 2009, the two depredation orders were reissued for another 5 years. See Migratory Bird Permits; Revision of Expiration Dates for Double-Crested Cormorant Depredation Orders (74 FR 15394, April 6, 2009). Finally, in 2014, both orders were reissued until June 30, 2019. See Migratory Bird Permits; Extension of Expiration Dates for Double-Crested Cormorant Depredation Orders (79 FR 30474, May 28, 2014). The 2014 final rule was accompanied by an environmental assessment (EA).

On May 25, 2016, the U.S. District Court for the District of Columbia vacated the two depredation orders (*Pub. Emps. for Env'tl. Responsibility v. U.S. Fish & Wildlife*

*Serv.*, 189 F. Supp. 3d 1 (D.D.C. 2016)). The Court concluded that the Service failed to consider a reasonable range of alternatives in the 2014 EA and directed the Service to take “a hard look” at the effects of the depredation orders on double-crested cormorant populations and other affected resources. Finally, the Court ordered that the Service perform a new and legally adequate EA or EIS under the National Environmental Policy Act.

### **Administrative Procedure**

This rulemaking is necessary to comply with the May 25, 2016, court order. Therefore, under these circumstances, we have determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and unnecessary. Public opportunity for comment is simply not required when an agency amends a regulation to comply with a court order. When an agency removes regulatory provisions set aside by a court order, that action is ministerial in nature and allows for no discretion on the part of the agency.

We have further determined, pursuant to 5 U.S.C. 553(d)(3), that the agency has good cause to make this rule effective upon publication, which is to comply with the District Court’s order as soon as practicable.

### **List of Subjects in 50 CFR Part 21**

Exports, Hunting, Imports, Reporting and recordkeeping requirements,  
Transportation, Wildlife.

### **Regulation Promulgation**

To comply with the court order and mandate discussed above, we amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 21—MIGRATORY BIRD PERMITS**

1. Remove the second authority citation for part 21.
2. The remaining authority citation for part 21 continues to read as follows:

AUTHORITY: 16 U.S.C. 703–712.

**§§ 21.47 and 21.48 [Removed and Reserved]**

3. Remove and reserve §§ 21.47 and 21.48.

Dated: \_\_June 15, 2018\_\_\_\_\_

\_\_Susan Combs\_\_\_\_\_

Susan Combs  
Senior Advisor to the Secretary,  
Exercising the Authority of the Assistant Secretary  
for Fish and Wildlife and Parks  
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